No. 94-1613

Supreme Court, U.S.
FILED
JUN 2 - 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

MARY E. LEARY
Counsel of Record
UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE)
Attorney for Respondent UE
2400 Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222
(412) 471-8919

25pp

QUESTIONS PRESENTED

1. Where an Employer's combined pre- and post-election unfair labor practices constitute a pattern of egregious misconduct which clearly demonstrates that the holding of a fair election, in the future, would be unlikely, what, if any, mitigating circumstances would require the National Labor Relations Board to remedy any pre-election misconduct with a rerun election, notwithstanding the pattern of egregious misconduct which would support a *Gissel* bargaining order.

2. Whether, an employer can rely on "the ordinary institutional time lapses inherent in the legal process " as a basis for denying enforcement of a remedial order of the National Labor Relations Board which includes a *Gissel* bargaining order.

PARTIES BELOW

The names of all parties to this proceeding in the Seventh Circuit Court of Appeals appear in the caption of this case.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Table of Contents	iii
Questions Presented	i
Opinions Below	2
Parties Below	ii
Statement of Jurisdiction	2
Statutory Provisions Involved	3
Statement of the Case	4
Argument	10
A. Basis for Granting Petition for Writ of Certiorari	10
B. Mitigating Circumstances	10
C. Application of *Gissel* Insures Employees §7 Rights and Effectuates the Policies of the Act	11
D. Board Discretion in Fashioning Remedies Must Be Flexible to Withstand Changing Nature of Violations	13

Page

E. Balancing Employee Turnover and Lapse of Time Against Employer Misconduct in Fashioning Remedies..... 14

F. [1] The Seventh Circuit's Examination of Possible Mitigating Circumstances..... 15

G. Remedial Authority of the Board..... 16

Conclusion..... 17

TABLE OF AUTHORITIES

OPINIONS BELOW:

America's Best Quality Coatings Corporation (ABQC) v. N.L.R.B., 44 F.3d 516 (7th Cir., 1995)..... 2, 15

STATUTE SECTIONS CITED:

28 U.S.C. §1254(1) ix..... 2

29 U.S.C. Sec. 157 x, 6..... 3, 12

29 U.S.C. Sec. 159 x..... 3

29 U.S.C.A. Sec. 160 x..... 4

29 U.S.C. 151, 160(a) ix..... 2

29 U.S.C. 160(e) ix..... 2

29 U.S.C. 160(f) ix, 8..... 2

---

[1] References to the Petitioner's appendices will be stated as "P. App. [page #]"

CASES CITED:

	Page
Chromalloy Mining and Minerals, Alaska Div. v. NLRB, 620 F.2d 1120 (5th Cir. 1980).....	14
Fibreboard Paper Products Corp. V. NLRB, 379 U.S. 203 (1964).....	16
Hickmott Foods, 242 NLRB 1357 (1979).....	9
J.L.M. Inc. v. NLRB, 31 F.3d 79 (2d Cir. 1994).....	14
Montgomery Ward & Co., Inc. v. NLRB, 904 F.2d 1156 (7th Cir. 1990).....	13
NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838 (4th Cir. 1982).....	12
NLRB v. Cott Corp., 578 F.2d 892 (1st Cir. 1978).....	15
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)....	i, 9, 11, 12, 13, 14
NLRB v. Gordonsville Industries, Inc., 252 NLRB 563 (1980), *affirmed, opinion withheld sub nom. Clothing Workers v. NLRB*, 673 F.2d 551; *cert denied* 457 U.S. 117 (1983)(D. C. 1982).....	13
NLRB v. Grandee Beer Distributors, Inc., 630 F.2d 928 (2nd Cir. 1980).....	11
NLRB v. J.H. Rutter-Rex Mfg. Co., 396 NLRB 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969).....	16
NLRB v. Keystone Pretzel Bakery, Inc., 696 F.2d 257 (3rd Cir. 1982).....	15
NLRB v. Koenig Iron Works, Inc., 681 F.2d 130 (2nd Cir. 1982).....	14

Page

NLRB v. Maidsville Coal Co. 693 F.2d 1119 (4th Cir. 1982), *enf'd* 718 F2d 658 (1983), *cert. denied* 465 U.S. 1079 (1984)..... 11

NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953)..... 16

NLRB v. Thrill, Inc., 980 F.2d 1137 (7th Cir. 1992)... 11

NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979)..... 15

NLRB v. Wilhow Corp., 666 F.2d 1294 (10th Cir. 1981)..... 14

NLRB v. Windsor Industries,Inc., 730 F.2d 860 (2nd Cir. 1984)..... 12

Phelps Dodge Corp. V. NLRB, 313 U.S. 177 (1941).. 16

Ron Tirapelli Ford, 987 F.2d 433 (7th Cir. 1993)..... 14, 17

Sure-Tan, Inc., 467 U.S. 883 (1984)..... 16

No. 94-1613

In The

Supreme Court of the United States

October Term, 1994

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

The Respondent United Electrical, Radio and Machine Workers of America (UE), files this brief in opposition to the Petitioner ABQC Corporation's Petition for Writ of Certiorari in which its seeks review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, decided on January 4, 1995, in Case Nos. 93-4039, 94-1173 and 94-1198, and respectfully prays that Petitioner ABQC Corporation's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit in the above-referenced matter be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *America's Best Quality Coatings Corporation (ABQC) v. N.L.R.B.*, 44 F.3d 516 (C.A. 7, 1995) (P.App. 1a)[1]

The decision and order of the National Labor Relations Board ("the Board" herein) is reported as *America's Best Quality Coatings Corp. and Staff Right, Inc., Joint Employers*, 313 NLRB No. 52 (1993). (P. App. 20a)

STATEMENT OF JURISDICTION

This case is before the Court on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1) which allows for discretionary review of cases in the court of appeals by writ of certiorari granted.

The company petitioned the Court of Appeals for the Seventh Circuit for review of the Board's order on December 23, 1993 pursuant to 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f). The Board filed a cross-application for enforcement on January 28, 1994. The Union also filed a petition for review on January 26, 1994, and the Company was permitted to intervene therein. On January 4, 1995, the Court of Appeals issued an order enforcing the Board's order.

The Board had jurisdiction over the unfair labor practices below under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 151, 160(a). The Board's Decision and Order issued on November 26, 1993, and is a final order with respect to all parties under Section 10(e) and 10(f) of the Act, 29 U.S.C. 160(e) and (f)). The Seventh Circuit Court of Appeals had jurisdiction over its proceeding under Section 10(e) and 10(f) of the Act, 29 U.S.C. 160 (e) and (f), the unfair labor practices having occurred in Milwaukee, Wisconsin.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. Sec. 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. Sec. 158. Unfair labor practices

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C.A. Sec. 160, Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * * *

STATEMENT OF THE CASE

Before the Seventh Circuit Court of Appeals, the Petitioner ABQC did not appeal the Board's unfair labor practice findings, but only challenged propriety of the Board's issuance of a bargaining order. (P. App. 7a) The Petitioner ABQC , "despite the findings and conclusions of the ALJ and the Board, contend[ed] that neither its pre-election conduct, nor its post-election conduct, nor a combination of the two prevented a fair election at the time or prevents fair elections in the future." (P. App. 7a)

ABQC is a closely held metal plating corporation located in Milwaukee, Wisconsin. The Company began operations in June, 1990, after purchasing the corporate entity from the then union-organized Allen Bradley Company. In early 1991, a union organizing campaign began in which the Union obtained signed union authorization cards from a majority of the workers on April 12, 1991. On April 18, the employee organizing committee demanded voluntary recognition of the Union. After the company rejected this request, a representation petition was filed. The following day, the Company transferred its employees to that of Staff Right, a temporary employment agency, and announced the transfer to scare the employees away from supporting the Union. (P. App. 8a) The

announcement did scare the employees, who then believed that they were only "temporary employees" with less job security.

Several calculated anti-union tactics by the Company were carried out extremely close to the time of election. In a break from their established hiring practices, the Company hired eight new employees just prior to the May 11 cut off date for election eligibility. Company officials interrogated employees as to their representation preferences. Threats by supervisory personnel included a promise that draconian working conditions would be imposed if the employees were to choose the Union as their bargaining representative. Peterson, the Company president[2] forced an employee to remove a pro-union leaflet, while protecting his anti-union signs.

Contrary to the Petitioner's contentions that "Whatever the level of discussion about the union and the employer's preferences, it was not likely the employees were intimidated by the employer. . . ." (P. Br. 4) The Board found that President Peterson engaged in interrogation which showed "that [ABQC], at the highest level of management, was willing to . . . cross the line between casual and coercive conversation in order to attempt to influence the outcome of the forthcoming election." (P. App. 23a)

---

[2] The Petitioner cites P. App. 41 erroneously contending that record evidence states: "During the same period, the company has had three different presidents (P. App. 41a); neither the person in charge today nor his predecessor were present during any of the conduct in issue." (P. Br. 6) This alleged evidence is not in the record, but rather P.App. 41a is background information about Eugene Plonka, a former president of ABQC, prior to the Union organizing campaign.

This is not consistent with the Petitioner's position before the court of appeals because ABQC was not "claiming that changes in management occurred. . . ." (P. App. 29a)

Also at P. Br. 6, the Petitioner ABQC refers to "much natural employee turnover that the majority of those working at ABQC today never voted in the election." Again said evidence not in the record

On June 17, just four days prior to the election, Peterson informed employees in a mandatory meeting that due to the pending election he would not give any raises or change any vacation schedules, despite the elimination of a "cash flow" problem. The election was held with 30 ballots for Union representation, 29 ballots against, and 9 determinative challenged ballots.[3]

Less than one month after the election with the objections and challenges to the election still pending, the Company gave warnings to three key organizing employees, Michael Proffitt, Keith Mills, and Hicks, for "poor attendance." Two days later, the three employees attempted to grieve the warning. Peterson would not accept the grievance because he did not recognize the Union. On the very next day 30 employees approached Peterson and asked for their promised wage increases and vacation time which had accrued. Peterson refused all of the requests.

On the same day as the Peterson-employee exchange, July 18, several storage tanks malfunctioned causing problems to several areas. Since several machines were no longer operating due to this mishap, first shift employees were released for the day by Peterson. On the very next day, when the employees of the first shift arrived for work, the employees were told that they were laid off indefinitely. On July 22, the laid off employees began to picket the plant. Five days later the Company reinstated some of the first shift employees, and began to grant eligible employees their earned vacation time and entertain merit wage reviews.

---

[3] In its Decision and Order, the Board overruled 5 of the 9 challenged ballots resulting in a 34 to 30 vote against the Union.

Contrary to the Petitioner's contentions, the recalls of first shift employees were not based on seniority, experience, or machine qualifications. Rather, the call-backs reflected the degree of individual employee Union involvement, with the most stringent Union supporters left in the cold. None of the union organizing committee members were called back until late October. [4] (P. App. 5a)

Perhaps the most glaring inaccuracy in Petitioner's statement of facts is the assertion that "No one was fired, no one was demoted, and no one was denied a day's pay, but the sort of conduct which did occur has been the basis for ordering rerun elections in other cases." The Petitioner ABQC's own illegal conduct resulted in the overturning of the first election, but before another election could be held, the Petitioner ABQC engaged in egregious unfair labor practices, none of which was challenged by the Petitioner in the lower court, including the layoff of 21 day shift plating department employees. "On July 18 there had been 23 day shift plating department employees including three lead persons. As of August 26 only 9 of the 20 had been recalled." Clearly they were denied more than "a day's pay."

Additionally, Peterson and company attorneys repeatedly interrogated laid off employees and union activists Mills and Proffitt as to their involvement in the July drainage malfunction. Despite their continual denials of any negligence on their part, the Company dismissed Mills and Proffitt on February 24, 1992, while the Company refused to investigate other leads. (P. App. 5a, 61a)

---

[4] Although the Petitioner did not appeal the Board's findings of facts and unfair labor practice violations below, contrary to the record, the Petitioner now asserts "Employees were recalled on the basis of need and skill, (Tr. 1416-1417) but the Board has deemed the sequence of those recalls discriminatory . . . . " (P.Br. 6)

The record evidence established that in late October 1991, the Company recalled Lisa Nixon. The company required Lisa Nixon to take a drug test upon recall. One week after the test. the company terminated her stating that her test for drug use was positive. Despite Lisa Nixon's denial of any drug use and her insistence on receiving a copy of the test results, the Company refused her request and refused to reconsider its termination. (P. App. 6a)[5] Although the Petitioner did not appeal these conclusions, it erroneously contends that "the bona fides of a drug testing program . . . disqualified one of the employees from returning." (P. Br. 6 citing P. App. 28a which states:

> "The discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." (P. App. 28a)

---

[5] "No explanation was given as to why the test report was not given to Nixon or why it was not in her file. * * *

"Here, the physical test report is inconsistent with the date of the actual 'collection' and cast into doubt the validity of Petersen's phone receipt of the test results on or about November 7 and, lend credence to Nixon's consistent denial of drug involvement. Respondent's entries on her personnel records also are inconsistent and, in the light of the overall strong showing of motivation against Nixon and others because of union activities, support an inference that Respondent has relied upon pretextual reasons in its apparent desire to avoid recalling a strong Union supporter. Moreover, I find that Respondent's assertion that Nixon was denied recall under its drug policy also is pretextual." (P. App. 64a)

In early September, 1991, the Company also unilaterally issued its first employee handbook drastically changing the terms and conditions of employment. Changes in wage structure, work hours, and polices of sexual harassment, drugs and alcohol use, report pay, call-in pay, outside employment, solicitation, progressive discipline, paid time-off, holidays and seniority were all effectuated. In late March 1992, ABQC unilaterally created formal job classifications which imputed pay structures and wage ranges. A further wage rate modification was enacted in June 1992.

The Board found that the election was plagued with unlawful activity by the Company's violations of §8(a)(1), (3), and (5) of the Act by coercively interrogating and threatening employees and by telling employees that they had been transferred to the payroll of Staff Right in order to scare them from supporting the Union. The Board found that the Company also violated §8(a)(1) and (3) by laying off all bargaining unit employees; by discriminatorily delaying the recall of certain employees after the layoff because of their union sympathies or activities; and, by suspending and terminating Mills, Proffitt and Nixon because of their union activities. The Board found additional §8(a)(1) and (3) violations in delaying and then granting employment benefits before, during and after the union campaign as well as making unilateral changes in terms and conditions of employment. The Board also found that the company violated §8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union after the Union demanded such action and had obtained signed authorization cards from a majority of the Company's production and maintenance employees. Further, the Board noted that the unfair labor practices intensified after the inconclusive June 21 election. (P. App. 27a)

The Company did not appeal the Board's findings of the unfair labor practices set forth above or the cease and desist orders including the "broad order" under *Hickmott Foods*, 242 NLRB 1357 (1979), but rather limits its challenge both here and in the Seventh Circuit Court of Appeals to the propriety of a *Gissel* bargaining order as a remedy.

ARGUMENT

A. Basis for Granting Petition for Writ of Certiorari

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Considerations Governing Review on Writ of Certiorari, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." While not controlling or all encompassing, subdivision (a) includes as one of the reasons that will be considered is "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . ."

B. Mitigating Circumstances

In the instant case, the Petitioner contends that "[t]his case warrants certiorari because it offers an opportunity to resolve the disputes between the decision makers about the circumstances which justify the invocation of what this Court has deemed an extraordinary remedy." (P. Br. 9)[6] The alleged dispute between the courts of appeals as set forth by Petitioner is whether the passage of time and employee turnover are relevant considerations to the validity of a bargaining order.

The Petitioner's primary focus is on "mitigating circumstances" which include alleged employee turnover and alleged management turnover; however, the record is void of any testimony and/or documentary evidence supporting counsel's argument as noted both by the court of appeals and by counsel's own footnote. (P. App. 29a, P. Br. 7, note 3)

---

[6] References to the Petitioner's Brief will be cited as "P. Br. [page #]" herein.

Further, the Petitioner raised the issue of the lapse of time which would render the Board's order stale. However, the court of appeals which has refused to enforce Board orders which were stale as in *NLRB v. Thrill, Inc.*, 980 F.2d 1137 (7th Cir. 1992) (in which there was a seven year delay between the issuance of the Administrative Law Judge's decision and the Decision of the Board) held that the time between March 1993 when the ALJ issued his decision and November 1993, "was far short of the seven years in *Thrill*, and characterized the two year time period between the election and the Board's order as "ordinary institutional time lapses inherent in the legal process." (P. App. 14a)

C. Application of Gissel Insures Employees § 7 Rights and Effectuates the Policies of the Act

Contrary to the Petitioner, the Respondent Union contends that the application and analysis of *Gissel*[7] bargaining orders by the many circuits has been very consistent. Although the "hallmark violations" giving rise to the Board's bargaining orders have differed, the application of the law as forged by this Court over twenty-five years ago has remained a beacon for the courts of appeals.

The circuits cite a litany of oft repeated holdings of law in regards to *Gissel* bargaining orders. Paramount is the strong preference for elections over other possible remedies crafted by the Board. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602-603(1969); *NLRB v. Maidsville Coal Co.* 693 F.2d 1119(4th Cir. 1982), *enf'd* 718 F2d 658, *cert. denied* 465 U.S. 1079 (1984); *NLRB v. Grandee Beer Distributors, Inc.*, 630 F.2d 928, 934(2nd Cir. 1980). The presumption of an election, or a rerun election, as the most preferred remedy emanates from Section

---

[7] *National Labor Relations Board v. Gissel Packing Company, Inc.*, 395 U.S. 575; 89 S.Ct. 1918; 23 L.Ed.2d 547 (1969)

7 protected rights of employees. Section 7 guarantees employees within the meaning of the Act the right to select their form of representation, if any, by a majority rules system. *29 U.S.C.* §157; *Gissel*, supra. However, an election can not always be a reliable indicator of the preference of a majority of employees, especially where, as here, the Petitioner ABQC engaged in calculated actions aimed at sabotaging the employees' Section 7 rights.

> "If the Board finds that the possibility of erasing the effects of past unfair labor practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment, once expressed through cards would, on balance, be better protected by a bargaining order,"

then a bargaining order is necessary and proper. *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 840 (4th Cir. 1982), citing *Gissel*, 395 U.S. at 614-615.

Egregious unfair labor practices committed by an employer constitute intrusions into employees' fundamental rights, termed "hallmark violations," that will generally support the issuance of a bargaining order unless some significant mitigating circumstance exists. *NLRB v. Windsor Industries,Inc.*, 730 F.2d 860, 867 (2nd Cir. 1984). Prior to the enforcement or reversal of a bargaining order, the Board, and the courts through appellate review employ a multi-faceted test in order to determine whether the issuance of a bargaining order is warranted. Majoritysupport for the union, typically through validly ob-

tained union authorization cards, at some point in time must be demonstrated.[8] This rule is very well established.[9]

After majority status has established, the effect of an employer's misconduct must be shown to have undermined the union majority strength, and most importantly, the possibility of erasing the effects of past employer unfair labor practices and of ensuring a fair election by the use of traditional remedies, though present, must be slight. *Gissel*, 395 U.S. at 614-15; *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990).

D. Board Discretion in Fashioning Remedies Must Be Flexible to Withstand Changing Nature of Violations

Two different levels of employer misconduct have predicated the issuance of bargaining orders. Unfair labor practices which have been characterized as being "pervasive" and "outrageous" have met the requisite level of misconduct for a bargaining order. *Clothing and Textile Workers v. NLRB, opinion withheld sub nom* 673 F.2d 551, (D.C. Cir. 1982) *affirming Gordonsville Indus., Inc.* 252 NLRB 563 (1980) , *cert.*

---

[8] In *NLRB v. Kawasaki Motors Corp., USA*, 257 NLRB 502, *enf'd, opinion withheld* 691 F2d 507, *cert. denied* 450 U.S. 1202 (1983), an employer unlawfully fired a union activist, threatened plant closure if union were elected, and promised benefits if union were defeated. However, the bargaining order was overturned despite the egregious conduct of the employer due to a lack of proper majority card showing. Similarly, where union misrepresentation was the principle method of obtaining authorization cards, the majority status of the union has not been recognized. *Massey Stores, Inc. v. NLRB*, 631 F2d 328 (4th Cir. 1980).

[9] In *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3rd Cir. 1980), is a rare exception where a bargaining order was issued by the Board despite the fact that no card majority was demonstrated.

denied 457 U.S. 117 (1983). *NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981). Less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process have also been remedied by bargaining orders. *J.L.M. Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). The court of appeals concluded that "The Board properly determined that the events surrounding the election fell into what we have previously termed the 'classic' bargaining case . . . the *Gissel*-type circumstance where the employer has thwarted its employees' efforts at organizing union representation." (P. App. 12a) citing *Ron Tirapelli Ford*, 987 F.2d 433, 441 (7th Cir. 1993).

E. Balancing Employee Turnover and Lapse of Time Against Employer Misconduct In Fashioning Remedies.

Mitigating circumstances such as employee turnover and lapse of time have been balanced against the primary interest of providing employees with a fair and uncoerced method of choosing their own representatives. In *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130 (2nd Cir. 1982) lapse of time, substantial employee turnover, loss of union membership, and lack of support for strike was balanced against the possibility of deterring future misconduct and of preventing wrongs. This method of analysis is typical in remedial bargaining order cases where mitigating circumstances are present. *Chromalloy Mining and Minerals, Alaska Div. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980). While Petitioner ABQC argues mitigating circumstances, the facts do not support the argument. There is no evidence of turnover; however, if there were, the Petitioner could not benefits from its illegal conduct which resulted in the termination of the principle union activitist and the layoff of the entire first shift plating department.

As in the instant case, any possible mitigating circumstances, which were not demonstrated at the lower court, have often failed to overcome the severity of the employer's misconduct which gave rise to the issuance of a bargaining order. See *NLRB v. Wilhow Corp.*, 666 F.2d 1299 (only one of twelve employees who had signed cards remained in workforce). Similar to the instant case, where nearly half of the current

employees were employed while employer engaged in unfair practices, the employer's conduct remained unremedied and the employer never gave assurances that the conduct would not recur, the employee turnover did not warrant a denial of the bargaining order. *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257 (3rd Cir. 1982)

In the instant case, there is no evidence of turnover in management and owners; no record evidence of turnover in employees; and, the time between the issuance of the ALJ decision on March 1, 1993 until the issuance of the Board decision on November 26, 1993, is routine, administrative delay inherent in the legal process.

The Petitioner stretches the facts to mirror cases where a nearly complete turnover in rank and file employees, management, and owners occurred, no charges of unfair labor practices against the new owner had been presented, and six and one-half years had passed since predecessor's misconduct, a bargaining order has been overturned. *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978). *See also NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979)(Each member of three employee bargaining unit voluntarily resigned before charges were heard) Accordingly, said cases are just not applicable to the facts as supported by the record evidence herein.

F. The Seventh Circuit's Examination of Possible Mitigating Circumstances

In the instant case, the Seventh Circuit did analyze subsequent events including time lapse and turnover. However, the court did not find any instance of extreme time gap. As stated in the opinion, "there were no extreme gaps of time which would render the Board's order stale. The election occurred in June, 1991. The ALJ issued his opinion in March, 1993. The Board made its decision in November, 1993. The gap between opinions here was only four months, far short of the seven years in *Thrill.*" *ABQC v. NLRB*, 44 F.3d 516 (7th Cir. 1995). The court also noted that just over two years had lapsed between election and order, which the court characterized as routine

administrative delay. These are hardly the circumstances which would provide for mitigation of the Board's order.

The court also noted that the Petitioner ABQC was not "claiming that changes in mangement occurred." (P.App. 29a) While Petitioner at footnote 3 admits that there is no record evidence concerning employee turnover.

G. Remedial Authority of the Board

Section 10 of the Act has repeatedly been interpreted by the Court "as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." See *Sure-Tan, Inc.*, 467 U.S. 883, 104 S.Ct. 2803 (1984); see *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 NLRB 258, 262-263, 90 S.Ct. 417, 419-420, 24 L.Ed.2d 405 (1969); *Fibreboard Paper Products Corp. V. NLRB*, 379U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964); *Phelps Dodge Corp. V. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941).

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Sure-Tan, Inc., supra,* at 899, citing *Phelps Dodge Corp., supra,* at 194, 61 S.Ct., at 852.
>
> See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 289, 97 L.Ed. 377 (1953) (power to fashion remedies 'is for the Board to wield, not for the courts").

At ABQC, the employees' Section 7 rights were trampled upon by the Petitoner through egregious pre- and post-election violations including coercively interrogating employees and threatening them by telling employees they had been transferred tothe payroll of a temporaryagency to scare them from supporting the union; by laying off approximately 21 first shift plating department employees; by discriminatorily

delaying the recall of employees because of their union activities; by suspending and terminating Mills, Proffitt and Nixon; by delaying and then granting employment benefits; and, by making unilateral changes. The court of appeals "recognized the Board's power, responsibility and broad discretion 'to devise remedies that effectuate the policies of the Act, subject only to limited review." *Ron Tirapelli Ford, supra at* 433.

CONCLUSION

Based on the above, including the lack of record evidence contrary to the factual misrepresentations by Petitioner, the Respondent United Electrical, Radio and Machine Workers of America (UE) respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Dated at Pittsburgh, Pennsylvania this 2nd day of June, 1995.

Respectfully submitted,

Mary E. Leary, General Counsel
United Electrical, Radio & Machine
Workers of America (UE)
2400 Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222
412/471-8919